

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 15, 2009

STATE OF TENNESSEE v. ROBERT LEE GREEN

Appeal from the Circuit Court for Cocke County
No. 0453 Ben W. Hooper, Judge

No. E2009-00359-CCA-R3-CD - Filed February 23, 2010

The defendant, Robert Lee Green, appeals from the trial court's denial of his motion to withdraw his guilty plea. Discerning no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

S. Joanne Sheldon, Newport, Tennessee (on appeal and at trial), and Keith E. Haas, Assistant Public Defender (at trial), for the appellant, Robert Lee Green.

Robert E. Cooper, Jr., Attorney General and Reporter, Sophia S. Lee, Assistant Attorney General, James B. Dunn, District Attorney General, and Amanda H. Lowe, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On March 28, 2007, the defendant was arrested for unlawful sexual contact with a six-year-old girl who was unrelated to him. The defendant, in a statement made on the date of arrest, admitted touching the victim but maintained that he did so because she reported having a rash in her genital area. However, the following day the defendant made a more detailed statement "that on one occasion . . . in March of 2007, he touched the vagina of the six-year-old child with his penis, on two other occasions with his hand." On July 9, 2007, a Cocke County grand jury indicted the defendant for three counts of aggravated sexual battery, *see* T.C.A. § 39-13-504 (2006), for the three separate encounters.

The defendant submitted a plea agreement to the trial court on January 31,

2007, in which the defendant pleaded guilty as charged, and the State recommended the minimum sentence of eight years' incarceration on each count with all sentences to be served concurrently. By operation of law, the defendant was required to serve 100 percent of his eight-year effective sentence. *See id.* § 40-35-501(i) (2006).

The trial court scheduled the defendant's sentencing for April 15, 2008; however, serious surgery on the defendant required that sentencing be continued until June 16, 2008. On June 16, 2008, the defendant made an oral motion to withdraw his guilty plea, and after another series of continuances, the court held a motion hearing on December 16, 2008.

During the motion hearing, defense counsel argued that, because the defendant moved to withdraw his guilty plea before sentencing, the trial court should allow him to withdraw his plea for "any fair and just reason." Citing this court's opinion in *State v. Marcus E. Robinson*, No. M2005-00670-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App., Nashville, April 5, 2006), the defense submitted the following factors for consideration:

1. The length of time between the entry of the guilty plea and the filing of the motion to withdraw it;
2. Why the grounds for withdrawal were not presented to the court at an earlier point in the proceedings;
3. Whether the defendant has asserted and maintained his innocence;
4. The circumstances underlying the entry of the plea of guilty, the nature and background of the defendant, and whether the defendant has admitted guilt;
5. Once the defendant has established a fair and just reason, whether the prosecution will be prejudiced should the plea be withdrawn.

The State and the trial court also referenced these factors throughout the hearing.

The 74-year-old defendant testified that he entered his guilty plea on January 31, 2008, and that he had surgery approximately one week later. He explained that the surgery required removing portions of his mouth and sewing his mouth closed for six weeks. He stated that he scheduled the surgery four months before his plea hearing.

The defendant testified that he was not guilty of the offenses but that he "didn't want to put nobody through . . . stress besides [him]self." He explained that he did not want to put the victim through a trial. He stated he "had a lot o[n] [his] mind" when he pleaded

guilty, including his surgery and recovery. He could not explain why he told the trial court that he was guilty.

The defense attorney asked about the statements that the defendant made to law enforcement officers in which he admitted to touching the victim's vagina. The defendant testified that he discussed these statements with his attorney. He explained that the first statement given to police regarding his touching the victim to check a reported rash was true. He stated that his second statement to authorities that led to his indictment was not true. He explained that after "forty days over there in that drunk cell . . . no sleep, no rest, constantly in there over you," he "would have admitted to trying to kill the president just to get some rest."

The defendant stated that he had visited with his doctor every two to three weeks during the time between his plea on January 31 and his motion to withdraw his plea on June 16. He testified that his mouth was stitched together for seven or eight weeks and that he did not contact his attorney during this time.

On cross-examination, the defendant admitted that he affirmed to the trial court that he was guilty of the offenses as charged during his plea hearing. He also admitted that his second statement, which he denied as true, was taken only "a day, day and a half" after his arrest. He admitted signing the second statement, which read, "The statement I gave you last night was not all true. I want to tell you the truth." The defendant testified that he did not recall saying this to the law enforcement officers, and he maintained that he did not recall several portions of the written statement. Defense counsel noted that the second statement was written by the law enforcement officers and not the defendant.

The defendant testified that he determined that he wanted to withdraw his plea after his psychosexual examination. He said, "Well, for one thing, I wasn't guilty, and number two, I didn't want to spend time for something I didn't do, that I wasn't guilty of." He stated that, after thinking about the consequences of eight years' imprisonment on his health, he determined that he wanted to withdraw his guilty plea.

The State called Margaret San Miguel, the clinical social worker who conducted the psychosexual evaluation on the defendant. She testified that during the interview, she did not discuss the length of sentence facing the defendant or the fact that his sentence was not probatable.

At the close of proof, the court noted, "[The defendant] could not have gotten a better plea agreement than was given to him. It was the minimum sentence." Looking to the first two *Robinson* factors, the length of time between the plea and motion to withdraw

and why the motion was not presented earlier, the court determined that the passage of five months neither helped nor hurt the defendant's motion. The trial court acknowledged that "[i]t was a pretty good length of time" but noted that the defendant's medical condition contributed to the delay.

Regarding the third factor, the defendant's assertion of innocence, the court acknowledged that the defendant unequivocally maintained his innocence during the hearing. However, the trial court then looked to the fourth factor, whether the defendant had admitted guilt and the circumstances of the plea, and noted that the defendant gave an "absolutely voluntary plea of guilty" where no force or coercion was used. The trial court found that the defendant only desired to withdraw his plea of guilty because he "d[oesn't] want to build eight years at one hundred percent." The court found that the defendant's credibility was "just pretty well demolished and destroyed." Regarding the fifth factor, the trial court found that the State would not suffer prejudice if the case were tried.

The court concluded, "There has been fair and just reasons presented, if they were credible, but due to the lack of credibility, I find that there has been no fair and just reason, and therefore, your motion for a plea withdrawal is denied."

On appeal, the defendant challenges the trial court's denial of his motion to withdraw his guilty plea. Generally, a defendant who submits a guilty plea is not entitled to withdraw the plea as a matter of right. *State v. Turner*, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995). The decision to allow the withdrawal of a guilty plea is within the discretion of the trial court and may not be overturned on appeal absent an abuse of discretion. *Henning v. State*, 201 S.W.2d 669, 670 (1947); *State v. Davis*, 823 S.W.2d 217, 220 (Tenn. Crim. App. 1991). However, the existence of discretion implies that there are limits to its exercise. *State v. Williams*, 851 S.W.2d 828, 832 (Tenn. Crim. App. 1992). The record must contain some substantial evidence to support the trial court's decision. *Goosby v. State*, 917 S.W.2d 700, 705 (Tenn. Crim. App. 1995).

Rule 32(f) of the Tennessee Rules of Criminal Procedure governs two situations in which a defendant wishes to withdraw a guilty plea before the judgment has become final. According to the rule, a trial court may permit the withdrawal of a guilty plea upon a showing "of any fair and just reason" before it sentences the defendant. Tenn. R. Crim. P. 32(f). Once the defendant is sentenced, however, the rule requires that defendants meet a different standard and also imposes a time constraint. According to the rule, a trial court may permit the withdrawal of a guilty plea after sentencing and before the judgment becomes final only "to correct manifest injustice." *Id.*

In the instant case, the defendant's oral motion to withdraw his guilty plea

occurred before his sentencing, and therefore he was required to show “any fair and just reason.” *See* Tenn. R. Crim. P. 32(f). In viewing the *Robinson* factors and the findings of the trial court, we hold that the trial court did not abuse its discretion in denying the defendant’s motion to withdraw his guilty plea. The trial court found the defendant’s testimony not credible and determined that he only wished to withdraw his plea upon fear of serving eight years’ confinement. A guilty plea will not be set aside simply because the defendant experiences a change of heart. *See Ray v. State*, 451 S.W.2d 854, 856 (Tenn. 1970). In light of the record before us, we discern no error in the trial court’s ruling.

JAMES CURWOOD WITT, JR., JUDGE